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No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

NACIREMA OPERATING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Interest of the United States	7
Summary of argument	9
Argument	11
A. By failing to inspect the shelter, respondent breached the warranty of workmanlike service owed by it to petitioner	13
1. A contract to perform services includes the implied warranty of workmanlike services	13
2. Respondent breached its contractual duty owed to petitioner to load the vessel safely and properly	14
B. Where the breach of a contract exposes the obligee to liability to a third party, this liability is the measure of damages for the breach, and the obligee is entitled to reimbursement	16
C. Petitioner's failure to remove the winch shelter does not defeat its right to reimbursement	20
1. Since the contractor's liability to the customer is of a purely contractual nature, it can be defeated only if the customer has breached a contractual duty owed by it to the contractor	20
2. The vessel did not violate a contractual duty owed by it to the stevedoring contractor in failing to remove the winch shelter	22
Conclusion	26

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CITATIONS

Cases:

	Page
Abrams v. *Factory Mutual Liability Co.*, 298 Mass. 141	14
Adah, The, 258 Fed. 377	23
American Mutual Liability Ins. Co. v. *Matthews*, 182 F. 2d 322	24
American President Lines v. *Marine Terminals Corporation*, 234 F. 2d 753, certiorari denied, 352 U. S. 926	15, 20, 24, 25
American Stevedores v. *Porello*, 330 U. S. 446	14
Amerocean S. S. Co. v. *Copps*, 245 F. 2d 291	8
Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52	14
Berti v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397	23
Bethlehem Shipbuilding Corp. v. *Joseph Gutradt Co.*, 10 F. 2d 769	18, 21
Booth-Kelly Lumber Co. v. *Southern Pacific Co.*, 183 F. 2d 902	21
Boston Woven Hose, etc., Co. v. *Kendall*, 178 Mass. 232, 59 N. E. 657	18, 21
Chambers v. *Tobin*, 204 F. 2d 732	12
City of Chicago v. *Robbins*, 2 Black 418	17
Cornec v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, certiorari denied, 284 U. S. 621	15, 23
Crawford v. *Pope & Talbot Inc.*, 206 F. 2d 784	20
Derry Electric Co. v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51	21
Dunn v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 67 N. E. 439	18
Evelyn, The, 282 Fed. 250	15
Gallagher v. *United States Lines Co.*, 206 F. 2d 177, certiorari denied, 346 U. S. 897	23
General Accident, etc. v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122	21
George's Radio v. *Capital Transit Co.*, 126 F. 2d 219	17
Gill v. *Middleton*, 105 Mass. 477	14
Gill v. United States, 184 F. 2d 49	24
Grillea v. *United States*, 232 F. 2d 919	19
H. & C. Grayson v. *Ellerman Line* [1920] A. C. 466 (H. of L.)	14, 21
Hadley v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145	16

Cases—Continued

	Page
Hagans v. *Farrell Lines*, 237 F. 2d 477	8
Halcyon Lines v. *Haenn Ship. Corp.*, 342 U. S. 282	20
Hastorf Contracting Co. v. *Ocean Transportation Corp.*, 4 F. 2d 583, affirmed, 4 F. 2d 584	23
Hickman v. *Jones*, 9 Wall. 197	12
Isham v. *Post*, 141 N. Y. 100	14
Lindeman v. *Textron, Incorporated*, 229 F. 2d 273	12
McFall v. *Compagnie Maritime Belge*, 304 N. Y. 314	18
McGeeney v. *Moran Towing Corp.*, 149 F. 2d 791	15, 23, 24
Manning Mfg. Corp. v. *Hartol Products Corp.*, 99 F. 2d 813	21
Maryland Cas. Co. v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731	19
Metcalfe v. *Chiarello*, 294 Fed. 29	24
Mikkelson v. *S. S. Granville*, 101 F. Supp. 566	24
Mikkelson v. *S. S. Granville*, 191 F. 2d 858	24
Mowbray v. *Merryweather*, [1895] 2 Q. B. 640	17, 19, 21
Robbins v. *City of Chicago*, 4 Wall. 657	17
Robert R., The, 255 Fed. 37	23
Ryan Stevedoring Co., Inc. v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124	6, 7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24
Schubert v. *Schubert Wagon Co.*, 249 N. Y. 253	14, 18
Seaboard Stevedoring Co. v. *Sagadahoc S. S. Co.*, 32 F. 2d 886	21
Seawright v. *A. Garcia y Cia, Ltda*, 138 F. 2d 881	20
Severance, The, 152 F. 2d 916	14
Smith v. *Nicholson Transit Co.*, 39 Supp. 795	24
Southport Transit Company v. *Avondale Marine Ways*, 234 F. 2d 947	14
Thomas v. *Malco Refineries*, 214 F. 2d 884	17
Union Stock Yards Co. v. *Chicago, etc., R. R. Co.*, 196 U. S. 217	18
United States v. *Arrow Stevedoring Company*, 175 F. 2d 329, rehearing denied, 175 F. 2d 333, certiorari denied, 338 U. S. 904	15, 23, 24
United States v. *Harrison*, 245 F. 2d 911	8
United States v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181	15, 24
United States v. *Savage Truck Line*, 209 F. 2d 442, certiorari denied, 347 U. S. 952	19

Cases—Continued

	Page
Washington Gas Light Co. v. *District of Columbia*, 161 U. S. 316	17
Wright v. *Wright*, 229 N. C. 503	18
Statute:	
Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 905):	
Section 5	7
Miscellaneous:	
Contribution and Indemnity Between Joint Tort Feasors, 45 Harv. Law Rev. 349	22
Corbin, *On Contracts*, Vol. 5, Section 1007	16
Keener, *Quasi-Contracts*, p. 408	17
Kent, *Commentaries* (12th ed.), Vol. 2, p. 589	14
Leflar, *Contribution and Indemnity Between Tort-feasors*, 81 U. of Pa. Law Rev. 130	17, 21
Restatement of the Law of Agency, Section 401 (c)	
Restatement of the Law of Contracts:	
Section 330	16
Section 334	19
Restatement of the Law of Restitution:	
Section 76	17
Section 86	17
Section 93	21
Section 95, comment a, par. 2	21
Seavey & Scott's Notes on the *Restatement of the Law of Restitution*, p. 150	19
Restatement of the Law of Restitution, Part I, Chapter 3, Topic 3, Introductory Note, pp. 328–329, Sections 93–96	19
Story, *On Bailments* (8th ed.), Section 431	14
Williston, *Contracts* (Rev. ed., 1937), Vol. 5, Sections 1356, 1394	16, 19
Williston, *Sales* (Rev. ed., 1948), Section 614 (a)	19
Woodward, *Law of Quasi-contracts*, p. 409	17

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OPINIONS BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals for the Second Circuit (R. 118–127) is reported at 236 F. 2d 848.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1956 (R. 127–128). Motions for a rehearing and for rehearing *in banc* were denied on November 5, 1956 (R. 128–129). The petition for writ of certiorari was filed on February 2, 1957 and granted on March 11, 1957 (R. 129). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The respondent, a professional stevedore contractor, which had undertaken to unload a vessel owned by petitioner, its customer, permitted its employees to use a temporary, flimsily constructed, shelter located on the customer's vessel without previously inspecting it. A longshoreman, injured by a piece of lumber which fell from the shelter, recovered damages from the vessel and was paid.

The question presented is whether, by failing to inspect the shelter, the stevedore contractor breached its undertaking to its customer, the ship, to perform its task in a careful and prudent manner, and became liable to reimburse the customer for the damages resulting from the latter's payment to the longshoreman.

STATEMENT

On January 1, 1952, the *F. E. Weyerhaeuser*, a vessel owned and operated by petitioner (R. 5), left Longview, Washington, with a cargo of lumber for the ports of New York and Boston (R. 69). The vessel arrived in New York harbor on January 25, 1952 (R. 71). There, some of the lumber, especially the deck cargo, was unloaded (R. 72). The unloading operations at New York were performed by the respondent, Nacirema, as contracting stevedore for the petitioner (R. 72, 89). The vessel left New York harbor in the morning of January 30, 1952 (R. 72), and arrived at Boston the following day (R. 72), after a fairly stormy trip during which it was exposed

to winds up to 33 miles an hour[1] with small sea and swell to moderate sea and swell (R. 75–77).

At Boston, respondent Nacirema again contracted to furnish petitioner the required stevedoring services (R. 63–66). The weather in Boston was poor. It was rainy and windy (R. 44, 98–99).[2]

On February 4, 1952, *i. e.*, on the fifth day of the unloading operations at Boston, one Connolly, a longshoreman employed by the contracting stevedore, was struck and seriously injured by a falling piece of lumber (R. 119). An investigation indicated that the wood might have fallen from a temporary winch shelter. A loose tarpaulin on the top of that shelter was kept in place by two loose pieces of wood similar to the one which had struck Connolly (R. 34, 37, 41, 49–50).

Connolly instituted an action against petitioner setting forth two counts, one based on negligence, the other one on unseaworthiness of the vessel (R. 4–7). Petitioner filed a third-party complaint against the respondent stevedoring contractor, alleging that it had undertaken to stevedore the vessel properly for petitioner but had breached that contract, and praying that respondent be adjudged liable to reimburse petitioner for any damages the plaintiff Connolly might recover from it as a result of the breach (R. 10–13).

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[1] The vessel, moving at a speed of about 13½ miles an hour, headed into winds of about 20 miles per hour (R. 76).

[2] A longshoreman testified: "I remember that particular ship, it was one of the windiest ships, windiest days and rainy days." (R. 44.)

At the trial, the undisputed evidence showed that shelters of the type from which the piece of lumber allegedly had fallen serve to protect from the elements the longshoremen operating the winches (R. 27–28, 59). These shelters are built automatically by the longshoremen themselves when they board the vessel and are made of dunnage or scraps of lumber which are always lying on the deck (R. 38, 42, 55, 59, 92). They are invariably destroyed by the ship's crew as a requirement of good seamanship when the vessel is readied for leaving port (R. 59–61, 63, 72–73), because the winds on the high seas would blow apart these flimsily constructed shelters, thereby endangering the ship's crew and superstructures, and would otherwise interfere with the safe operation of the vessel (R. 59–61, 63).

The captain and the second officer of the *F. E. Weyerhaeuser* testified emphatically that the vessel arrived in Boston harbor without any deck shelters (R. 72–73, 81–82, 90–92, 95, 98), and that, in view of the hazards these shelters create for the crew, they would have been seriously derelict in their duties and subject to dismissal if they permitted their vessel to leave port (at New York) without first having removed those shelters (R. 72–73, 80, 95–96). Both officers pointed out that the loose tarpaulin and the loose pieces of wood could not have remained from New York to Boston, but would have blown or fallen off as the result of the strong wind and of the ship's motion (R. 76–78, 92; see *supra*, pp. 2–3).

Connolly's witnesses on the other hand testified just as positively to the contrary. The two winch operators stated that the shelter was on the deck of the *F. E. Weyerhaeuser* when she docked in Boston, and that they did not build the shelter themselves (R. 26–27, 39–41, 45, 46, 50). The gang foreman, a permanent employee of the contracting stevedore (cf. R. 66–67), testified to the same effect (R. 52–53, 55–56). He admitted that he did not inspect the shelter either before or after the accident (R. 55–56). The two winch men inspected the shelter only after the accident had occurred (R. 34, 49).[3]

The District Court first submitted Connolly's case against the vessel (*i. e.*, against petitioner) to the jury (R. 103). Under the instructions, the jury could render a verdict in favor of Connolly on the issue of negligence only if they found the shelter was on the *F. E. Weyerhaeuser* when it docked in Boston (R. 104).[4] The jury found in favor of the plaintiff Connolly on the negligence count, and against him on the issue of seaworthiness (R. 117). The District Court thereupon directed a verdict in favor of the third-party defendant, Nacirema, the contracting stevedore, which is the respondent here (R. 117).

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[3] Since the shelters could not have been erected before the deck cargo was removed in New York harbor (R. 70, 71, 88–89), they were necessarily erected by Nacirema's employees either in New York or in Boston.

[4] With respect to the issue of seaworthiness, the instructions were that Connolly could recover only if the jury found that the shelter was an appurtenance of the vessel (R. 105–106, 113–116).

Petitioner acquiesced in the verdict in favor of the injured longshoreman and that judgment has been paid and satisfied (R. 120). It appealed, however, from the dismissal of its third-party complaint against its stevedore contractor. A majority of the Court of Appeals affirmed (R. 118–127). The prevailing opinion (R. 118–124) held that it was established by the verdict that the winch shelter was on the deck of the *F. E. Weyerhaeuser* when it arrived in Boston harbor, that a board on top of it fell and injured Connolly, and that the vessel negligently failed to perform a duty owed by it to Connolly (R. 121). The ship, the opinion declared, owed the non-delegable duty to provide Connolly with a reasonably safe place to work (R. 121–122), and "[o]ffering a ready-made shelter to Connolly the ship could not shift its non-delegable responsibility for the unsafe condition thereof onto Connolly's employer," its contracting stevedore (R. 122). The majority distinguished the decision of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, on the ground that, although the respondent stevedore contractor might have been negligent in the manner in which the shelter was constructed in New York harbor, it could not foresee that petitioner, its customer, would not remove the flimsy structure, but would instead offer it as a safe place to work to the Boston longshoremen which the contractor would employ there (R. 123–124).[5]

[5] The majority did not address itself to the question of whether respondent had violated any of its contractual duties in Boston.

Lumbard, J. dissented (R. 124–127). He took the position that with respect to petitioner, the customer, the stevedoring contractor had undertaken the primary responsibility for the safety of its employees and that the vessel's failure to remove the shelter was at most passive negligence which did not destroy the customer's right to be reimbursed by the contractor as the person primarily responsible (R. 126–127).

INTEREST OF THE UNITED STATES

The United States, as the world's largest shipowner, and therefore one of the largest customers of contracting stevedores, is concerned with the frequently-recurring question raised by this cause, *i. e.*, the circumstances in which a customer-ship, which has become liable to a longshoreman as a result of a dangerous condition brought about by its stevedore-contractor-employer's failure properly to perform its contract with the customer, may obtain reimbursement from the stevedoring company whose breach of contract actually caused the injury.

Two years ago, the United States appeared as *amicus curiae* in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, involving this issue. The Court then held that the customer-ship's right to reimbursement did not rest upon the tort concepts measuring the relative responsibility of the parties, such as primary and secondary, or active or passive tortious conduct,[6] but that it was of a contrac-

[6] The use of such concepts of joint tortfeasorship may well be precluded by the operation of Section 5 of the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. 905).

tual nature based upon the stevedoring contractor's breach of its warranty of workmanlike service, which is not defeated by the fact that the customer vessel also might have failed to perform a duty owed to the longshoreman or to the ship's crew. Under *Ryan,* the test of liability is to be found in the reciprocal contractual duties between the stevedoring contractor and the customer vessel. The prevailing opinion below does not follow this contractual analysis, and while the dissent uses it to some extent, it utilizes terms such as primary and secondary responsibility and active and passive negligence, *i. e.,* concepts which were expressly rejected by this Court in the *Ryan* case. Three additional recent cases—*Hagans* v. *Farrell Lines,* 237 F. 2d 477 (C. A. 3);[7] *Amerocean S. S. Co.* v. *Copp,* 245 F. 2d 291 (C. A. 9); and *United States* v. *Harrison,* 245 F. 2d 911 (C. A. 3)[8]—indicate that other Courts of Appeals have had difficulties in applying the teachings of this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp, supra.*

In these circumstances, we believe it appropriate to file this brief in which we shall analyze, in the light of the *Ryan* decision, the nature of the customer ship's contractual right to reimbursement, and the scope of the stevedoring contractor's warranty of the skill of its trade.

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[7] Chief Judge Biggs and Maris, *J.* dissented from the denial of a motion for a rehearing *in banc*, pointing out that the decision unduly narrowed the scope of *Ryan.*

[8] Healy, *J.* filed a vigorous dissent relying on *Ryan.*

SUMMARY OF ARGUMENT

The factual and legal, if not the procedural, problems raised by this cause are similar to the ones decided by this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124. A longshoreman in Boston was injured while unloading the vessel of his employer's customer, presumably by a piece of lumber which had fallen from a winch shelter. The longshoreman sued the ship on the grounds (*a*) that its officers had been negligent in failing to remove the shelter before leaving the prior port (New York), and (*b*) that the defective shelter had made the vessel unseaworthy. The jury rendered a verdict in favor of the longshoreman on the negligence count alone.

In the present proceedings, petitioner, the customer, seeks to be reimbursed by its stevedore for the liability of the ship incurred to the longshoreman as a result of the stevedore's breach of contract. The District Court directed a verdict in favor of the stevedore contractor, and the Court of Appeals affirmed. In this posture of the case, petitioner is entitled to a reversal, unless it appears that it cannot succeed even if the facts on the record are construed most favorably to it.

A

Respondent's contract to perform stevedoring services for its customer, the petitioner, carried with it the implied promise to perform those services with due professional care and skill; in other words, respondent warranted the skill of its trade of contracting stevedore. This warranty is the very essence of the agree-

ment to stevedore petitioner's vessel. The promisor under such a contract (whether common law or maritime) to perform professional services is liable for damages caused by sub-standard performance.

Under its contract, respondent had assumed the obligation to its customer, petitioner, to load, stow, and unload the cargo carefully and safely. This contractual obligation, which includes the duty not to let its longshoremen operate under dangerous conditions, was breached when respondent (in Boston) failed to tear down the flimsy winch shelter and permitted its longshoremen to work in it for five days without any inspection.

B

In the case of a breach of contract, recovery is measured by the damages foreseeably resulting from a breach. Where liability to a third party is among the foreseeable damages, the promisee is entitled to be reimbursed for this liability, even in the absence from the contract of an express indemnity agreement.

Here, petitioner has been subjected to liability to the injured longshoreman as the result of respondent's breach of its contractual duty owed to petitioner to perform the unloading operations carefully and skillfully. This consequence of liability was foreseeable; accordingly, petitioner's payment to the longshoreman constitutes the measure of damages for respondent's breach of contract.

C

Petitioner's asserted failure to remove the winch shelter (in New York) does not defeat its right of

recovery against its contractor. Since the remedy of reimbursement is purely contractual in nature, it is not affected by concepts such as active and passive, or primary and secondary, negligence—principles designed to allocate and distribute tort liability among tortfeasors. The only question here is whether the customer's failure to remove the shelter constituted the breach of a contractual duty owed to respondent, its contracting stevedore. This it was not, because the customer's right to rely on the zealous performance and superior experience of a professional stevedore contractor is the very purpose for which such a specialist is hired.

Thus, while the stevedoring contractor owes the customer ship the duty to use proper care in the loading or unloading process, the ship does not owe the contractor a reciprocal duty. It need not tell the professional stevedoring contractor anything which the latter would know or find out if it knew its business. Any competent stevedoring contractor knows that a shelter which had been erected and used by the stevedore contractor in another port, and had withstood the journey from New York to Boston in mid-winter, is bound to be in a weakened and dangerous condition and a hazard for the longshoremen. Petitioner, the customer, did not owe respondent, the professional, the obligation of removing the obvious danger or of warning it of this plain danger.

ARGUMENT

Petitioner, the shipowner, seeks review of a decision of the Court of Appeals which upheld the grant of a

directed verdict dismissing petitioner's third-party complaint against its stevedore for breach of contract. In this posture, petitioner is entitled to a reversal unless it appears that it cannot succeed, even if the evidence were construed by the jury most favorably to it, giving it the benefit of every legitimate inference. *Hickman* v. *Jones,* 9 Wall. 197, 201; *Chambers* v. *Tobin,* 204 F. 2d 732, 733 (C. A. D. C.); *Lindeman* v. *Textron, Incorporated,* 229 F. 2d 273, 274 (C. A. 2).

The substantive issue raised is the same as was presented to this Court in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124, *viz,* whether a customer ship, which has been held liable to a longshoreman for injuries suffered in an accident caused by a contracting stevedore's breach of its professional duty to perform all parts of its loading and unloading operations in a safe workmanlike manner, is entitled to be reimbursed for the judgment which it had to pay to the injured longshoreman. In *Ryan,* the Court answered this question in the affirmative. It held that, where such a stevedoring contractor breaches its warranty to perform its contract with its customer ship competently and safely (350 U. S. at 133), it becomes obligated to discharge the customer of all foreseeable damages, which includes the liability of the vessel to third persons (350 U. S. at 129, fn. 3). And this liability of the stevedoring contractor, based upon the breach of the contractual duties owed by it to the customer, is not defeated by the circumstance that the latter may have been derelict in duties it owed to the injured longshoreman

and which it employed the stevedore contractor to perform (350 U. S. at 134–135).

We submit that it appears plainly from the record that respondent did not perform its contract duty to petitioner with professional care and skill when it permitted its winchmen in Boston to use the flimsy shelters on board the *F. E. Weyerhaeuser* for five days without even inspecting them; that it was a foreseeable consequence of this breach of contract that the petitioner would become liable to a longshoreman; and that the vessel did not violate any duty owed by it to its stevedore contractor when it failed to remove the shelters in New York.[9] A jury thus could easily have found in favor of the petitioner-customer, and it was error to direct a verdict against the customer and in favor of the contractor.

A. BY FAILING TO INSPECT THE SHELTER, RESPONDENT BREACHED THE WARRANTY OF WORKMANLIKE SERVICE OWED BY IT TO PETITIONER

1. *A contract to perform services includes the implied warranty of workmanlike services.* An agreement to perform services carries with it the implied undertaking that the promisor will carry out his task with due care and ordinary skill. In other words, the obligor warrants the skill of his trade, *spondet*

[9] In view of the jury verdict (*supra*, p. 5), we must, of course, base our argument on the assumption that the shelters were on the deck of the *F. E. Weyerhaeuser* when it docked in Boston.

peritiam artis.[10] As this Court pointed out in *Ryan*, this warranty to the customer is of the very essence of the contract for professional services (350 U. S. at 133). The obligor "must answer for the damage if the quality of the service is lower than the standard." *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257.

This rule that a contract to perform services implies the promise to perform the work competently and safely is not limited to the common law.[11] *Southport Transit Company* v. *Avondale Marine Ways*, 234 F. 2d 947, 951 (C. A. 5), points out that the decision of this Court in *Ryan* merely restates "a time-honored traditional maritime cause of action for failure prudently to perform."[12] Cf. *The Severance*, 152 F. 2d 916, 920 (C. A. 4); *H. & C. Grayson* v. *Ellerman Line* [1920] A. C. 466, 472, 474 (H. of L.).

2. *Respondent breached its contractual duty owed to petitioner to load the vessel safely and properly.* Under the foregoing general principle, a stevedoring contractor, such as respondent, which holds itself out to prospective customers as an experienced technician engaged in the business of loading, stowing and un-

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[10] Kent, *Commentaries* (12th ed.), Vol. 2, p. 589; Story, *On Bailments* (8th ed.), Section 431; *Isham* v. *Post*, 141 N. Y. 100, 105–106; *Gill* v. *Middleton*, 105 Mass. 477, 479; *Adams* v. *Factory Mutual Liability Co.*, 298 Mass. 141, 143.

[11] The discussions of the rule by Kent and Story, *supra*, fn. 10, hint that it may have been imported from the civil law, the cradle of admiralty.

[12] The stevedoring contract is a maritime contract. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–62; *American Stevedores* v. *Porello*, 330 U. S. 446, 456.

loading cargo, has the duty to perform this task carefully and safely. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2); *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2). This duty which, as this Court showed, is of the very essence of the stevedoring contract (*supra*, pp. 12–13), is breached where the stevedoring contractor permits its longshoremen to work the customer's vessel under conditions which are dangerous, either to its own knowledge or according to the professional standards of a competent stevedore. *United States* v. *Arrow Stevedoring Company*, 175 F. 2d 329, 331 (C. A. 9), certiorari denied, 338 U. S. 904; *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182 (C. A. 9); *American President Lines* v. *Marine Terminals Corporation*, 234 F. 2d 753, 758 (C. A. 9), certiorari denied, 352 U. S. 926.

Respondent violated this contractual obligation when it permitted its winchmen to occupy the shelter without even inspecting it. The testimony and the decision below clearly establish that these shelters are flimsily built, likely to be blown apart on the high seas (*supra*, pp. 3, 4). If they survived the ocean journey at all, it was certain that their structure had been seriously weakened. The failure to tear down the shelters, and their use for days at Boston without any inspection, thus came close to recklessness.[13] In-

[13] *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 333, 334 (C. A. 9).

Boston Woven Hose, etc., Co. v. *Kendall,* 178 Mass. 232, 59 N. E. 657 (1901),[19] held that where the customer of a boilermaker had become liable to third persons as the result of an explosion of the boiler, he was entitled to be reimbursed by the boilermaker as damages for breach of warranty. And *Dunn* v. *Uvalde Asphalt Paving Co.,* 175 N. Y. 214, 217, 67 N. E. 439 (1903), decided that where a prime-contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to reimburse the former, as its customer, even in the absence of an express indemnity agreement. *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253, 257, established the rule generally that reimbursement is based upon the breach of the duty to perform faithfully, that it is the compensation for having furnished substandard services to the customer.

In sum, it has become generally recognized that reimbursement is the proper measure of damages where a breach of contract foreseeably subjects the customer to a liability toward third persons. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124, 129, fn. 3, 130–131, 132–133. And see *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314, 330; *Wright* v. *Wright,* 229 N. C. 503, 508–509; *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.,* 10 F.

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remote and the stevedoring company was entitled to be reimbursed for the sum paid to its employee, and was not limited to nominal damages.

[19] Quoted with approval in *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.,* 196 U. S. 217, 226–227 (1905).

2d 769 (C. A. 2);[20] *Maryland Cas Co.* v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731, 733 (C. A. 2); *United States* v. *Savage Truck Line*, 209 F. 2d 442, 447 (C. A. 4), certiorari denied, 347 U. S. 952; *Restatement of the Law of Contracts*, Section 334;[21] Williston, *Contracts* (Rev. ed., 1937), Section 1394; Williston, *Sales* (Rev. ed., 1948), Section 614 (a); *Restatement of the Law of Restitution*, Part I, Chapter 3, Topic 3, Introductory Note, pp. 328–329, Sections 93–96; *Restatement of the Law of Agency*, Section 401 (*c*).

2. As we have shown (*supra*, pp. 14–16), respondent breached its contractual duty to perform its customer's unloading operation with professional skill when it permitted its winch operators to use the flimsy shelter without even inspecting it. As could easily be foreseen, a longshoreman, Connolly, was injured as the result of this breach and petitioner, the customer, became liable to Connolly because it had violated (as a result of respondent's breach of contract) the non-delegable duty owed by it to Connolly to provide him with a safe place to work. Petitioner, consequently, is entitled to be reimbursed by respondent for the damages petitioner had to pay Connolly.[22]

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[20] Cf. Seavey & Scott's Notes on the *Restatement of the Law of Restitution*, p. 150.

[21] Section 334, Illustration 5, is a paraphrase of *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (C. A.).

[22] Cf. the epitomization of the *Ryan* decision by Learned Hand, J., in *Grillea* v. *United States*, 232 F. 2d 919, 924 (C. A. 2): "the injuries to the employee measure the damages for the breach."

C. PETITIONER'S FAILURE TO REMOVE THE WINCH SHELTER DOES NOT DEFEAT ITS RIGHT TO REIMBURSEMENT

1. *Since the contractor's liability to the customer is of a purely contractual nature, it can be defeated only if the customer had breached a contractual duty owed by it to the contractor.* We have shown in the preceding portions of this brief that respondent's liability as a professional stevedore contractor to reimburse its customer, petitioner, is of a purely contractual nature. Consequently, the only defenses open to respondent are those which excuse a breach of its contract. This Court has exploded the notion that the concepts of active and passive, or primary and secondary, tortious conduct or negligence, developed in the law of quasi-contractual or tort indemnity,[23] have any validity in this area of contract. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 at 133, 134.[24] The sole issue therefore is whether the petitioner's failure to remove the shelter in New York constituted a breach of a duty owed by petitioner, the customer, to respondent, the professional contractor which it employed.

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[23] *Supra*, pp. 7, 17, fns. 6, 16.

[24] See *Seawright* v. *A. Garcia y Cia, Ltda.*, 138 F. Supp. 881, 883 (E. D. Pa.). Similarly, since petitioner does not seek contribution from a joint tortfeasor, the considerations underlying *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, are inapplicable. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133; *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753, 760 (C. A. 9), certiorari denied, 352 U. S. 926; *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 793 (C. A. 3).

The verdict of the jury has established that, by failing to remove the winch shelter, petitioner had breached the non-delegable duty owner by it *to Connolly*, the longshoreman, to provide him with a safe place to work. It does not follow, automatically, that this breach of a non-delegable duty *to Connolly* equally constituted the breach of a duty owed by petitioner *to respondent*, the professional hired to perform that non-delegable duty.[25] To the contrary, it is the very purpose of having work performed by a specialist to be able to rely on his warranty of superior knowledge and experience. *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 134–135; *Boston Woven Hose, etc., Co.* v. *Kendall*, 178 Mass 232, 237; *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474 (H. of L.). For this reason, it is generally recognized that the customer's failure to inspect, or to discover a dangerous condition, or even to remove one which the contractor could discover if he used the usual skill of his occupation, does not normally defeat the customer's right to be reimbursed by an expert contractor.[26]

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[25] Cf. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640, 644.

[26] *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769, 772 (C. A. 9); *Seaboard Stevedoring Co.* v. *Sagadahoc S. S. Corp.*, 32 F. 2d 886 (C. A. 9); *Derry Electric Co.* v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co.* v. *Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc.* v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81

2. *The vessel did not violate a contractual duty owed by it to the stevedoring contractor in failing to remove the winch shelter.* Petitioner's failure to remove the shelter upon leaving New York harbor violated, as we have noted, duties of due care owed to its crew and to the longshoremen working on the vessel in Boston harbor. It did not constitute, however, the violation of a duty owed to the respondent which it employed as its professional stevedoring contractor. A competent stevedore would have realized that the shelter was in a weakened condition after it had been used in New York harbor for several days and remained on the deck of the vessel during the trip from New York to Boston during the winter months. Proper stevedoring practices therefore required the removal of the shelter, or at least its inspection, and that was the professional duty owed by respondent to petitioner (*supra*, pp. 15–16, 19–21).

Petitioner, the customer, on the other hand, did not owe to respondent, the contractor, any corresponding duty to remove the shelter, or to warn the stevedoring contractor of obvious danger. In the words of Learned Hand, J., the ship is under no duty to tell the stevedore anything he would know if he knew his business.

U. of Pa. Law Rev. 130, 156–158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351–352.

The element of the right to rely on the expertise of the specialist contractor distinguishes cases such as *Union Stock Yards Co.* v. *Chicago, etc., R. R. Co.*, 196 U. S. 217, 228, in which reimbursement was denied on the ground that "the negligence of the parties has been of the same character." We submit that, according to the analysis of this Court in *Ryan*, the parties here were not *in pari delicto* but *in pari peritia* (cf. *supra*, pp. 7–8, 12–13, 13–14.)

Hastorf Contracting Co. v. Ocean Transportation Corp., 4 F. 2d 583 (S. D. N. Y.), affirmed, 4 F. 2d 584 (C. A. 2). Similarly, it has been held in *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621, "The stevedoring company owes to the vessel and her owners the duty of using due care in the loading; but the vessel and her owners owe no such duty to the stevedoring company."

Thus, the stevedoring contractor owes to its customer the duty to stop the loading or unloading operation on its own initiative as soon as it realizes that it is unsafe to proceed. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 331 (C. A. 9), certiorari denied, 338 U. S. 904; *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791, 793 (C. A. 2); *The Robert R.*, 255 Fed. 37, 39 (C. A. 2); *The Adah*, 258 Fed. 377, 380 (C. A. 2). Moreover, since the stevedoring contractor is in charge of the operation "and the master had no duty or right of supervision as to instrumentalities adopted and methods used,"[25] the contractor even owes the duty to the customer to disregard improper instructions given by the ship's officers. It has either to disregard such orders or to stop working until the dangerous condition has been remedied. *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2); *Smith* v.

[25] *Cornee* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177, 179–180 (C. A. 2), certiorari denied, 346 U. S. 897; *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 401 (C. A. 2). See the testimony at R. 85, 109, that the stevedoring operations are independent of the ship's officers' duties and that their sole responsibility with respect to the unloading operations here involved was to see that the cargo was not dropped overboard.

Nicholson Transit Co., 39 F. Supp. 795 (W. D. N. Y.).[28]

For these reasons the circumstance that petitioner had not removed the shelter in New York did not justify its use by respondent in Boston. The situation is identical with the frequent occurrence that the stevedoring contractor uses defective material furnished to it by the vessel. If the defect is evident or could have been discovered upon such inspection as the expert stevedoring contractor was obliged to make, the customer's right to reimbursement is not defeated by the fact that the ship itself had furnished the equipment. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C. A. 9), certiorari denied, 338 F. 2d 904; *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9).[29]

A recent re-examination of this problem in the light of the *Ryan* decision may be found in *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753 (C. A. 9), certiorari denied, 352 U. S. 926. There, a longshoreman had been injured by a defective strong-

[28] Indeed, where the vessel refused to cooperate with the stevedoring company, it was the latter's duty to be "energetic" in attempting to remedy the situation. *Metcalfe* v. *Chiarello*, 294 Fed. 29, 30 (C. A. 2).

[29] Where the defect in the equipment is hidden and unknown to the stevedoring company and could not have been detected had it used the care required in the circumstances, it is of course not liable for reimbursement because no duty to the ship has been breached. *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2); *Gill* v. *United States*, 184 F. 2d 49 (C. A. 2); *Mikkelson* v. *S. S. Granville*, 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2), cf. the district court decision, 101 F. Supp. 566, at 568–569 (E. D. N. Y.).

back, a part of the vessel's equipment. The stevedoring contractor had been advised of this defect. The court held that the vessel was entitled to reimbursement, because (234 F. 2d at 758):

> When the shipowner through its ship's officer informed Marine that some of its beams were defective and requested that all excess beams be removed, Marine, knowing that Number 2 Strongbeam had no lock, was under a specific duty to remove that beam. By failing to remove the beam and by continuing with the work under these hazardous conditions known to it, Marine breached its implied contractual duty to do its work in a safe and workmanlike manner.

and again (234 F. 2d at 759):

> Here, Marine was charged with notice before the accident from the ship's officer that some strongbacks were defective * * *. It would have taken little time to remove the lockless beam * * *. Marine [the stevedoring company] was in full control of the work and was in charge of this very situation. After Marine was notified of the defective beams by the shipowner, the shipowner did nothing to increase the hazard or to cause the breach of contract by Marine. Marine openly and plainly breached its obligation to perform its work in a safe manner. We think it is no defense to that breach that American [the ship] supplied the defective beam.

These considerations are fully applicable here. As an experienced professional stevedoring contractor, respondent was put on notice that the winch shelter

was in an unsafe condition. Removal, or at least inspection, would have been a simple thing. Five days later, the accident occurred. Petitioner had done nothing to increase the hazard once respondent had assumed full control in Boston, begun the stevedoring operation, and carried on for five days. The circumstance that petitioner had earlier failed to remove the shelter thus does not constitute a defense to its claim for reimbursement.

CONCLUSION

The District Court erred in directing a verdict in favor of the respondent stevedoring contractor and against its customer, petitioner. Indeed, we believe that petitioner's motion for a directed verdict (cf. Pet. Brief, p. 3) should have been granted. It is therefore respectfully submitted that the decision of the Court of Appeals should be reversed.

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